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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/631,360	07/31/2003	Theodore E. Jones JR.	NBI-866A	1927

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HOLLANDER LAW FIRM, P.L.C.  
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EXAMINER
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ADAMS, GREGORY W

ART UNIT	PAPER NUMBER
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3652

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/01/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	Application No.	Applicant(s)	
	10/631,360	JONES ET AL.	
	Examiner	Art Unit	
	Gregory W. Adams	3652	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 11 January 2007.
- 2a) ☒ This action is FINAL.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 21,22,24-33 and 35-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 21,22,24-33 and 35-54 is/are allowed.
- 6) ☐ Claim(s) \_\_\_\_\_ is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 21-22, 24-33 & 35-49 are rejected under 35 U.S.C. 102(a) as being anticipated by Loewenthal et al. (US 6,189,678).

With respect to claims 21, 26-33 & 36-40, Loewenthal et al. disclose a method for continuously packaging or sorting fragile articles having varying thicknesses in a stack comprising:

feeding a plurality of articles (indicated generally as 10) having varying thicknesses from an article infeed to one of a plurality of stripping devices, e.g. slug, 32', 33;

removing a set number of articles in the form of a stack by each stripping device wherein a proportional shifter 18 is coupled to each stripping device;

measuring a stack height (C6/L1-10) of said set number of articles with an article gauge 52, 59 attached to each proportional shifter to determine any change in stack height, wherein said set number of articles are placed within the article gauge 38a, 50, 52, 59 for said measuring of stack height; and

adjusting each proportional shifter for a change in the stack height in proportion to the set number of articles removed without interrupting a flow of articles. (C5/L65-67)

With respect to claim 22, Loewenthal et al. disclose switching each said proportional shifter between two different pre-determined numbers of fragile articles to be removed by each stripping device. C6/L6

With respect to claims 24, 25, 35, Loewenthal et al. disclose wherein a number of articles in a stack are set from about 2 to about 6 articles.

With respect to claims 41-42, Loewenthal et al. disclose that each proportional shifter comprises a rod and two blocks.

With respect to claim 43, Loewenthal et al. disclose that two blocks are threaded blocks, each block having a pitch that matches one of the pitches on the threaded rod.

With respect to claim 44, Loewenthal et al. disclose that pitches of two threaded blocks differ by a factor equal to a ratio of two different pre-determined numbers of articles to be removed from said stack.

With respect to claim 45, Loewenthal et al. disclose moving one block along a rod, thereby adjusting an article rest for the change in the stack height of said set number of articles.

With respect to claim 46, Loewenthal et al. disclose each article gauge comprises two plates, and wherein one plate is attached to one of the two blocks.

With respect to claim 47, Loewenthal et al. disclose a stripping device comprising a rotary material stripper feeder adapted to continuously sweep a set pre-determined number of articles into a wrapper.

With respect to claim 48, Loewenthal et al. disclose a proportional shifter comprising a variable stroke piston contained in an air cylinder.

With respect to claim 49, Loewenthal et al. disclose a distance moved by the variable stroke piston is limited by pre-determined stroke stops.

With respect to claims 50, 51, Loewenthal et al. disclose that after said adjustment, the number of articles in the article gauge is different from the number of articles removed. Applicant is respectfully reminded that to be entitled to patentable weight in method claims, the structural limitations recited therein must affect the method in a manipulative sense, and not to amount to the mere claiming of a use of a particular structure. See *Ex parte Pfeiffer*, 135 USPQ 31 (1961). Here, the structural limitations of a ... do not impact the method as required, thus amounting to the mere claiming of a use of a particular structure. Applicant is claiming a method but the method claim does not recite a step, e.g. it doesn't have a "providing" or "using" or some other -ing ending word that provides the active step. Thus, its only intended use and given very little patentable weight.

With respect to claim 52, Loewenthal et al. disclose that each proportional shifter is switched between two different pre-determined numbers of fragile articles to be removed by each stripping device while automatically proportionally compensating for changes in article thickness. Applicant is respectfully reminded that to be entitled to

Art Unit: 3652

patentable weight in method claims, the structural limitations recited therein must affect the method in a manipulative sense, and not to amount to the mere claiming of a use of a particular structure. See *Ex parte Pfeiffer*, 135 USPQ 31 (1961). Here, the structural limitations of a ... do not impact the method as required, thus amounting to the mere claiming of a use of a particular structure. Applicant is claiming a method but the method claim does not recite a step, e.g. it doesn't have a "providing" or "using" or some other -ing ending word that provides the active step. Thus, its only intended use and given very little patentable weight.

With respect to claims 53-54, Loewenthal et al. disclose that the number of articles in the article gauge is different from the number of articles removed.

### ***Response to Arguments***

Applicant's arguments filed January 12, 2007 have been fully considered but they are not persuasive. New claims 50-54 have been addressed above.

Set as in "set number" is a relative term. Barring structure that defines Applicants number as set over the cited prior art or leaves open the ability to vary said set number via some further defined structure any number is a set number at any instant in time. Loewenthal's gauge comprises the elements 38a, 50, 52, 59 which control stack heights. Loewenthal's senses stack height inasmuch as they include angular sensors attached to servo motors which sense the position of traveling nuts and spindles which control the height of a stack. Loewenthal's apparatus includes at least potential stack height settings which can be adjusted between slugs which necessitates the proportional shifter remove less items from the support 38a.

With respect to claims 44, 50-51, 53 & 54, Applicant is respectfully reminded that to be entitled to patentable weight in method claims, the structural limitations recited therein must affect the method in a manipulative sense, and not to amount to the mere claiming of a use of a particular structure. See *Ex parte Pfeiffer*, 135 USPQ 31 (1961). Here, the structural limitations of a ... do not impact the method as required, thus amounting to the mere claiming of a use of a particular structure. Applicant is claiming a method but the method claim does not recite a step, e.g. it doesn't have a "providing" or "using" or some other -ing ending word that provides the active step. Thus, its only intended use and given very little patentable weight.

#### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

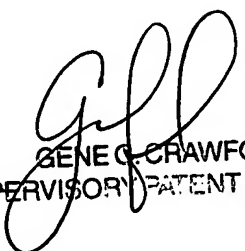
Art Unit: 3652

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gregory W. Adams whose telephone number is (571) 272-8101. The examiner can normally be reached on M-Th., 8:00-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gene Crawford can be reached on (571) 272-6911. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

GWA

  
GENE C. CRAWFORD  
SUPERVISORY PATENT EXAMINER